Filed 6/28/19 P. v. Spillard CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EVERETT SPILLARD, Defendant and Appellant.	A154354 (Humboldt County Super. Ct. No. CR 1703134)

Everett Spillard was convicted of three counts of oral copulation or sexual penetration of Jane Doe No. 2, a child 10 years of age or younger, in violation of Penal Code section 288.7.[1] Relying principally on *People v. Gainer* (1977) 19 Cal.3d 835 (*Gainer*), Spillard contends the trial court prejudicially erred when it answered a juror's questions about what would happen if the jury was unable to reach a verdict. Spillard also argues that under *People v. Dueñas* (2018) 30 Cal.App.5th 1157 (*Dueñas*), this case must be remanded for the trial court to determine his ability to pay certain fines and fees. We disagree and affirm.

BACKGROUND

In light of the narrow issues presented, we discuss the factual background only as necessary to resolve the appeal.

[1] All statutory references are to the Penal Code unless otherwise specified.

I. Trial

A. Evidence at trial

Spillard was charged in a 17-count information with various sex offenses relating to two sisters, Jane Doe No. 1 and Jane Doe No. 2. Counts 1 through 9 related to Jane Doe No. 1; counts 10 through 17 related to Jane Doe No. 2.

Defendant was a friend of the girls' adoptive mother and father. After being evicted from his apartment, defendant lived for over a year in the garage at the girls' home. The allegations against defendant first surfaced when Jane Doe No. 1 told her parents that defendant had "done something to her" after the girls' father found that Jane Doe No. 1 had been looking at pornography on the home computer. Sometime thereafter, Jane Doe No. 2 also disclosed that defendant had molested her.

Jane Doe No. 2, who was 11 at the time of trial, testified about the acts underlying counts 10 through 12, the three counts of conviction. She explained that when she was approximately six years old, she was playing inside her house with defendant's son, known as "Little E." or "E." When Little E. would not share the game they were playing, she went into the garage to tell defendant. After defendant told Jane Doe No. 2 what to do about Little E.'s refusal to share the game, defendant grabbed her, pulled her pants down, laid her down on the couch on which he slept, and orally copulated her. Defendant then digitally penetrated her and forced her to orally copulate him by pushing and holding her head so that his penis would go in her mouth. Jane Doe No. 2 felt sick and uncomfortable while defendant was doing these things to her and further testified that defendant told her, "Keep quiet, or I will hurt somebody that you love." Jane Doe No. 2 also testified about other sexual abuse defendant allegedly committed while living in the garage at her home; that testimony related to counts on which the jury ultimately hung.

The prosecution played for the jury a videotaped interview in which Jane Doe No. 2, then 10 years old, spoke with a "child interview specialist" from Humboldt County's Child Abuse Services Team (CAST) about the acts underlying the three counts of conviction, as well as other sexual abuse defendant had allegedly committed. As it relates to the counts of conviction, Jane Doe No. 2 explained to the CAST interview

specialist that she once went into the garage where defendant was staying because she wanted to tell defendant that his son E. was "hogging the game" they were playing. Jane Doe No. 2 stated that after discussing the game with E., defendant forced her to orally copulate him, orally copulated her, and digitally penetrated her. Jane Doe No. 2 stated that defendant had told her, "Don't speak of it," while he was doing these things to her.[2]

Defendant testified that he lived in the garage in the girls' family home for several months starting in early 2015. He stated that he left because he had a falling-out with the girls' mother, who retained some of the property he had in the garage despite his efforts to get it back. He further testified that, as a result of his diabetes, he suffers from erectile dysfunction and had been unable to achieve an erection since 2009. Defendant told the jury that his penis was only 6 centimeters long, and the court admitted forensic photographs to that effect. Defendant denied having any sexual contact with the girls and shared with the jury his concern that the girls' father had been bathing them for over a year.[3]

In his interview with the police (which was played for the jury), defendant denied ever being alone with the children and told the police that they should be "looking at" the girls' father, as he was inappropriately bathing them "til they were like 11 years old." In that same interview, he told police that the girls would "grind on you" and were "lyin', cheatin', stealin' little crumb snatchers."

In addition to testifying in his defense, defendant also presented the testimony of several character witnesses as well as a doctor who testified that erectile dysfunction is a common side effect of diabetes and the medications defendant was taking.

B. Deliberations and Verdict

Deliberations began on the afternoon of March 27, 2018. On the afternoon of March 28, the jury asked for a readback of Jane Doe No. 1's testimony. At 1:30 p.m. on

[2] Like Jane Doe No. 2's trial testimony, the CAST interview also included Jane Doe No. 2's recounting of the acts underlying charges on which the jury hung.

[3] While he was in jail on this case, defendant used another inmate's PIN to call Child Welfare Services and report that the girls' father was sexually abusing them.

March 29, the jury sent a note asking the court to "elaborate" on the difference between reasonable doubt and possible doubt. With the agreement of counsel, the court responded: "In response to your question, I cannot provide a response other than referring you to the CALCRIM instruction 220."

At approximately 3:05 p.m. on the same date, the jury sent a note indicating that it was deadlocked. In the courtroom, the court commented to juror No. 8, the foreperson, that its response to the jury's question seeking elaboration on reasonable doubt "probably wasn't what you may have expected"; juror No. 8 responded, "To put it mildly." When the court asked juror No. 8 if there was anything the court could do to assist the jury, juror No. 8 said no but indicated the court should ask the other jurors for their views. The court asked juror No. 8 if there would be any benefit to the jury going home for the long weekend and then coming back on Monday to resume deliberations. Juror No. 8 responded: "As we walked out, we made a conscious effort to look at our numbers on each decision and there is a—there is a possibility, but as it stands right now the—to tip the scales would be quite a process. I mean it is not—I am not ruling it out. I am saying at this time it is split." The court then asked the other jurors whether they felt further deliberations would or would not help. Juror No. 5 responded: "I don't know. There was one last thing we wanted to look at. I don't know if I am saying it correctly." The court asked if it would be helpful to go back into the jury room "to review what that was." Juror No. 10 responded: "I think it was requested by a juror so we have to. If one juror requested it in our jury room, how could we not? One person needs that, we have to do it. If it is all 12, we have to do it. If anybody needs it, we should be able to see it again, hear it, see it."

Juror No. 12 added: "We have been at this [process of deliberating] by my count for 15 hours plus, and I would hate to abandon this process at this point. I would hate for anyone to have to go through what I have gone through. I am willing to work as hard as we can to try to come to a unanimous decision at least on one of the counts and I think there is a possibility of that. I really think there is an open mindedness remaining in the room, and we are treating each other with respect for the most part. There have been a

couple of tense moments, but I really think the perspective of the weekend could help. And if we run back into the same logjam, then we would let you know, but I feel like we have too much invested in this to stop now." When the court asked if it would be beneficial to return to the jury room, juror No. 11 responded: "I think that would be beneficial."

The court then suggested that the jury go back into the jury room to discuss the evidentiary issue raised by juror No. 5 and whether it might be beneficial to return on Monday after having had the long weekend to think individually about the case. In response to a query from juror No. 12 about whether the court could really not further elaborate on the jury instructions, the court explained that the jury instruction on reasonable doubt "is not one that is subject to further examples or anything."

At that point, juror No. 8 asked: "May we ask you what is the—what happens if we do not reach a unanimous decision?" The court responded, "Well, as the instruction tells you, you have to have a unanimous decision to arrive at a verdict," to which juror No. 8 responded that he understood. The court continued: "If you cannot arrive at a verdict, we would start over again." Juror No. 8 then replied, "Who—I am not understanding." The court explained: "Not you folks. If you can't arrive at a verdict, you come in and tell us, which you just did, but you are talking about going back and discussing it. If you can't arrive at a verdict, that is the end of it for you folks." Juror No. 8 asked, "We are not allowed to know anything else other than that?" The court responded, "I don't know what else I can tell you. If you can't arrive at a verdict, we start the process over again with a different group of people." After juror No. 8 thanked the court for that explanation, the court continued, "Or it is possible we would—," at which point the court turned to juror No. 7, saying, "Number 7, yes." Juror No. 7 asked, "How many days do we have to work on this?" The court responded that there was no limitation and that it was up to the jurors. The court went on: "If you decide further deliberations would be of assistance, if you decide there is something we can help you with, you know, other than the one [question relating to reasonable doubt] we didn't help you with very much. Would it be okay if I send you back in for you guys to discuss that

area a little more and let us know?" The foreperson responded that the jury appreciated the court's time; the court and the foreperson went on to discuss logistics of how the jurors should inform the court whether they intended to return on Monday, and the court sent the jurors back to the deliberation room.[4]

The record reflects that the jurors returned to continue their deliberations on Monday, April 2. At 8:50 a.m. on that date, the jury sent another question, this time asking who performed SART (sexual abuse response team) exams. The court directed the jury to the testimony of Sergeant Diana Freese.

At 1:35 p.m. on April 2, the jurors sent a note asking to see the prosecution's PowerPoint presentation, specifically seeking information as to where each of the 17 charged acts took place. The court indicated that, off the record, the court and counsel had agreed to provide the jury with a partially redacted copy of the second amended information. The court stated that along with the copy of the second amended information, the court would provide the jury the following written response: "In response to your request, we cannot provide the district attorney's [P]ower [P]oint presentation used in closing argument for your review. A copy of the second amended information is provided which contains a description of the location where it is alleged that the conduct related to each count took place." Defense counsel stated that he agreed with that approach. The assistant district attorney made clear that the redactions included notices as to, e.g., convictions requiring sex offender registration, and that what was being provided to the jury was "simply the words to each count as they appear on the information and the special allegations." Defense counsel again agreed with this approach.

At 4:10 p.m. on April 2, the jury returned its verdict, finding defendant guilty on counts 10, 11, and 12, but not reaching verdicts on any other count. The jurors collectively indicated that there was nothing the court could do to assist it in reaching

[4] At no time during or after these discussions did either counsel object to the court's colloquy with the jurors.

verdicts on the remaining counts. The court declared a mistrial as to the counts on which the jury hung and discharged the jury.

II. New Trial Motion and Sentence

The defense filed a motion for a new trial pursuant to Penal Code section 1181(6), which governs verdicts that are "contrary to law or evidence." (Pen. Code, § 1181(6).) The court denied the motion on the basis that Jane Doe No. 2's testimony regarding the counts of conviction was "credible and meets the test of establishing the elements of the offense by proof beyond a reasonable doubt."

The court then sentenced defendant to 15 years to life on count 10, with the same sentences on counts 11 and 12 to be served concurrently to the sentence in count 10. The court further imposed a restitution fine in the amount of $10,000 under section 1202.4, subdivision (b); a parole revocation fine under section 1202.45 (which was suspended unless defendant's parole was revoked); court operations assessments in the amount of $40 per count of conviction under section 1465.8; and criminal conviction assessments in the amount of $30 per count of conviction under Government Code section 70373.

DISCUSSION

I. The Court's Response to Juror No. 8's Questions

Relying principally on *Gainer*, Spillard contends that the trial court prejudicially erred in responding to juror No. 8's questions about the consequences of the jury not reaching a verdict. We disagree.

Gainer was a murder case in which the testimony of more than 30 witnesses consumed 12 days of trial. (*Gainer*, *supra*, 19 Cal.3d at p. 840.) After approximately two days of deliberations, the foreperson informed the court that the jury was split 11 to one and was having difficulty reaching a unanimous verdict. (*Ibid.*) In an effort to break the deadlock, the court then gave what is often called a "dynamite charge" or "*Allen*

charge."[5] (*Id*. at pp. 841–842, citing *Allen v. United States* (1896) 164 U.S. 492.) The jury resumed deliberations after lunch and reached a verdict finding Gainer guilty of second degree murder two hours and 55 minutes later. (*Id.* at p. 842.)

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[5] The court instructed the jury as follows: " 'Ladies and Gentlemen of the Jury: In a large proportion of cases and perhaps strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions and not a mere acquiescence in the conclusion of his or her fellows, yet in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, that you are selected in the same manner and from the same source from which any future jury must be selected, and there is no reason to suppose the case will ever be submitted to twelve men or women more intelligent, more impartial or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And, with this view, it is your duty to decide the case, if you can conscientiously do so.

"In order to make a decision more practicable, the law imposes the burden of proof on one party or the other in all cases. In the present case, the burden of proof is on the People of the State of California to establish every part of it beyond a reasonable doubt. And, if in any part of it you are left in doubt, the defendant is entitled to the benefit of the doubt and must be acquitted. But in conferring together, you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments.

"And, on the other hand, if much the larger of your panel are for a conviction, a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one, which makes no impression upon the minds of so many men or women equally honest, equally intelligent with himself or herself, and [who] have heard the same evidence with the same attention and with an equal desire to arrive at the truth and under the sanction of the same oath.

"And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

"That is given to you as a suggestion of the theory and rationale behind jurors coming to a decision one way or the other.

"So, Ladies and Gentlemen of the Jury, I'm going to ask you—after lunch—to retire and continue with your deliberations and see if it is at all possible to resolve the matter.

The Supreme Court reversed, holding that *Allen* charges should be "prohibited in California" in light of their "potentially coercive impact" and the fact that they "inaccurately state[] the law." (*Gainer, supra*, 19 Cal.3d at pp. 842–843.) In reaching that conclusion, the court focused on the two most common and objectionable elements of *Allen* charges: first, "the discriminatory admonition directed to minority jurors to rethink their position in light of the majority's views," and second, the "direction . . . that '[y]ou should consider that the case must at some time be decided.' " (*Id.* at p. 845.)[6]

Because the trial court in this case did not admonish the jurors in the minority to reconsider their views in light of the majority's opinions, we focus on *Gainer*'s analysis of the *Allen* charge's legally inaccurate statement "that a criminal case 'must at some time be decided.' " (*Gainer, supra,* 19 Cal.3d at p. 852.) In declining to impose a per se rule of reversal when a trial court erroneously informs the jury that a hung jury will inevitably necessitate a retrial, the court explained: "When the statement [that 'the case must at some time be decided'] is part of a supplementary charge to a divided jury, there is a significant danger that the verdict will be influenced by a false belief that a mistrial will necessarily result in a retrial; on the other hand, the statement does not threaten to distort the process of jury decision-making to the same degree as the admonition to dissenters. Accordingly, a per se rule of reversal is not required when only this erroneous

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"I understand that, of course, on occasions it is impossible to do so, but— based upon the instruction I have just given to you—I would appreciate that after lunch—if you would go back and resume your deliberations and see if you can arrive at a verdict and that the deadlock can be broken.' " (*Gainer, supra,* 19 Cal.3d at pp. 841–842.)

[6] In explaining its concern that the first aspect of the charge improperly places the sanction of the trial court behind the viewpoint of the majority, the *Gainer* court noted, "Since recognition of the existence of a majority or minority faction is irrelevant to the issue of guilt, such reference is erroneous, even if contained in an arguably noncoercive, 'balanced' *Allen* charge which explicitly admonishes the majority as well as the minority to reconsider their views." (*Gainer, supra,* 19 Cal.3d at p. 850, fn. 12.) The Supreme Court subsequently disapproved this footnote, deeming it "inconsistent" and "somewhat perplexing" dictum. (*People v. Valdez* (2012) 55 Cal.4th 82, 162–164 [rejecting defendant's claim that he was entitled to reversal after the trial court gave a "balanced instruction" that encouraged members of both the majority and minority to " 'have an open mind . . . to reevaluating' " their views].)

statement is included in otherwise correct instructions, even if given to a deadlocked jury. In such cases, a miscarriage of justice will be avoided if the reviewing court makes a further examination of all the circumstances under which the charge was given to determine whether it was reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) In so doing, however, the court should recognize that the more the erroneous statement appears to have been a significant influence exerted on a jury after a division of juror opinion had crystallized, the less relevant is the court's own perception of the weight of the evidence presented to the jury before the impasse." (*Id*. at pp. 855–856.)

Comparing *Gainer* to the record in this case demonstrates that the trial court's impromptu responses to the jury's questions bear little resemblance to the lengthy, formal, supplementary jury charge criticized by the Supreme Court in *Gainer*. Before we focus on the substance of the trial court's statements, we must look at "all of the circumstances," including the context of the court's comments. (*Gainer*, *supra*, 19 Cal.3d at p. 855.) It bears noting that at the time of the challenged remarks, the jurors in this case had already expressed their willingness to continue deliberating—both to consider additional evidence and to "work as hard as they [could]" to reach a verdict on any count. That context alone distinguishes this case from *Gainer*. In addition, rather than formally instructing deadlocked jurors that they should "consider that the case must at some time be decided . . . and there is no reason to suppose the case will ever be submitted to twelve men or women more intelligent, more impartial or more competent to decide it," as did the trial court in *Gainer*, the court here was giving off-the-cuff responses to spontaneous and persistent inquiries by juror No. 8. (*Id.* at p. 841.)

Furthermore, there can be no legitimate quarrel with the court's initial, ambiguous responses to juror No. 8's questions regarding the consequences of a hung jury—viz., that the verdict must be unanimous, that an unspecified "we" would in an unspecified way "start all over again," and that a deadlock "would be the end of it for you folks." When juror No. 8 continued to ask whether the court could give any additional information, the

court responded, "I don't know what else I can tell you. If you can't arrive at a verdict, we start the process over again with a different group of people." Accordingly, the brief comment that "we start the process over again with a different group of people" is the closest the trial court came to an erroneous instruction that "the case must at some point be decided." And unlike in *Gainer*, where the court effectively ordered the jurors back to the deliberation room after admonishing them to "consider that the case must at some point be decided," and to recognize that "it was [the jury's] duty to decide the case," the court here left it up to the jurors to decide whether additional deliberations after the weekend might assist them. (*Gainer*, *supra*, 19 Cal.3d at p. 841.) A careful review of the record satisfies us that there was no *Gainer* error.

Moreover, even assuming the court erred in responding to the jury's questions, the proceedings after the court's comments doom Spillard's effort to establish the prejudice required for reversal. In *Gainer*, the jury returned a guilty verdict on the same day as the erroneous *Allen* charge, a mere two hours and 55 minutes after resuming deliberations. (*Gainer*, *supra*, 19 Cal.3d at p. 842.) By contrast, the jurors in this case chose to continue deliberating for more than a full day after the challenged remarks, including a long weekend between their resumed deliberations. Notably, none of their questions after the court's comments related in any way to the consequences of a hung jury or the prospect of a retrial. In addition, the fact that the jurors returned verdicts on only three of the 17 counts indicates that they took seriously their duty to review the evidence and determine for each individual count whether it established proof of Spillard's guilt beyond a reasonable doubt—without regard to whether there might eventually be a retrial on the counts on which they hung. And finally, our review of the record demonstrates that the trial court correctly assessed the consistency and credibility of Jane Doe No. 2's testimony and the strength of the People's evidence on counts 10 through 12. Having examined of all of the circumstances under which the challenged remarks were made, there is no evidence that the court's remarks exerted a "significant influence on the jury," and it is thus not reasonably probable that a result more favorable to Spillard would have been reached in absence of any purported error. (*Id.* at p. 855.)

In sum, we conclude that there was no error under *Gainer* and that there was no prejudice even assuming error. (*Gainer, supra,* 19 Cal.3d at p. 855, citing *People v. Watson, supra*, 46 Cal.2d at p. 836.)[7]

II. Request for Remand

In supplemental briefing, Spillard also requests that we remand his case because the trial court failed to assess his ability to pay certain fines and fees, as required under *Dueñas*. He concedes, however, that his trial counsel did not object to imposition of the fines and fees he now challenges. He asserts that the error was not forfeited because *Dueñas* presented an unforeseen change in the law and further argues that if his counsel was required to object to preserve this claim of error, his counsel was ineffective for failing to do so. We see no need to remand.

Dueñas held that due process requires a trial court to conduct a hearing to ascertain a defendant's ability to pay before imposing court facilities and court operations assessments under section 1465.8 and Government Code section 70373. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1164.) *Dueñas* further held that restitution fines under section 1202.4 must be imposed but stayed unless and until the People demonstrate that a defendant has the ability to pay the fine. (*Id.* at pp. 1172–1173.)

Courts after *Dueñas* have reached different conclusions on the issue of whether failure to object constitutes forfeiture of any argument that the trial court erred by imposing fines and fees without determining a defendant's ability to pay. (Cf. *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 [finding forfeiture, as "*Dueñas* applied law that was old, not new"] with *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [declining to find forfeiture despite failure to object].)

We agree with the approach taken by the court in *People v. Johnson* (2019) 35 Cal.App.5th 134. There, another panel of this Division explained that for restitution fines above the $300 statutory minimum set forth in section 1202.4, subdivision (b)(1), a

[7] In light of this conclusion, we need not address either the People's argument that Spillard forfeited any claim of error by failing to object or Spillard's assertion that his trial counsel's failure to object constitutes ineffective assistance of counsel.

failure to object may constitute forfeiture because section 1202.4, subdivision (c) allowed trial courts to consider a defendant's ability to pay more than the minimum fine even before *Dueñas*. *(Ibid.*, fn 5.) In finding that Johnson had not forfeited his challenge to the minimum restitution fine imposed in that case, the *Johnson* court reasoned: "For restitution fines *above* the statutory minimum, the statutory scheme expressly permits sentencing courts to take the defendant's ability to pay into account in setting the fine. (See § 1202.4, subd. (c) ['[i]nability to pay may be considered . . . in increasing the amount of the restitution fine in excess of the minimum fine pursuant to paragraph (1) of subdivision (b)'].) The distinction between minimum and above minimum restitution fines has consequences for the applicability of forfeiture doctrine. Had the court imposed a restitution fine on Johnson above the statutory minimum, we would have come to the opposite conclusion on the issue of forfeiture, at least for purposes of that fine, since, there, it could be said that he passed on the opportunity to object for lack of ability to pay." (*Ibid.*) Because the court in this case imposed a restitution fine above the statutory minimum, we follow the rationale in *Johnson* and find that Spillard has forfeited his challenge to this fine.

Spillard contends that if failure to object to the restitution fine constitutes forfeiture, his counsel was ineffective. This rote argument, however, is inadequate to carry his heavy burden of overcoming the presumption that he received effective assistance. (*People v. Lucas* (1995) 12 Cal.4th 415, 436–437.) Under *Strickland v. Washington* (1984) 466 U.S. 668, an ineffective assistance claim requires proof of both deficient representation and prejudice flowing from an attorney's substandard performance. (*Lucas*, at pp. 436–437, citing *Strickland*, at p. 689].) Because this is a direct appeal, Spillard must show that his counsel's failure to object lacked any "rational tactical purpose," and that but for his counsel's deficiencies, there is a reasonable probability that the result would have been different. (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1007–1008.) The record demonstrates that defendant cannot satisfy either *Strickland* prong. Defendant testified that he was a master carpenter most recently earning $42.50 per hour and had worked for at least 10 years in that trade. He further

testified that he had two cars, a dozen bicycles, and was able to travel on vacation and buy his son "whatever he wants" for birthdays and Christmas Similarly, other witnesses testified that Spillard traveled for festivals, music events, and beach visits, gave money to friends in need, and bought three glass sex toys that cost between $50 and $100 each. In light of the record demonstrating his ability to pay the restitution fine, Spillard fails to establish either that his counsel's failure to object was irrational or that there is a reasonable probability that the result would have been different had his counsel done so.

As to the court operations assessments and criminal conviction assessments in the amounts of $40 and $30 per count of conviction, respectively, we agree with *Johnson*'s approach in finding any error harmless. (*People v. Johnson*, *supra*, 35 Cal.App.5th 13, 4.) Even if the trial court should have conducted an ability to pay hearing before imposing such fees under *Dueñas*, these assessments total $210, a debt Spillard can satisfy through either the above-described resources or his earnings while in prison. (*Ibid*.) Any error in failing to conduct an ability to pay hearing is thus harmless. Courts after *Dueñas* have reached different conclusions on the issue of whether failure to object constitutes forfeiture of any argument that the trial court erred by imposing fines and fees without determining a defendant's ability to pay. (Cf. *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 [finding forfeiture, as "*Dueñas* applied law that was old, not new"] with *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [declining to find forfeiture despite failure to object].)

DISPOSITION

The judgment is affirmed.

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BROWN, J.

WE CONCUR:

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POLLAK, P. J.

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STREETER, J.